COVER SHEET

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Globalisation – the Bane of Popular Sovereignty?

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This book's theme – challenges to the sovereignty of nation-states from the pressure of globalisation – has special piquancy for me. I have long advocated[1] that the constitutional law of our sovereign nation[2] should expressly recognise the sovereignty *of the people*, and provide mechanisms through which the people can enact enforceable legal rules specifying that their legislators *must not* make certain laws, or *must* advance certain objectives. Yet now it is suggested this notion is anachronistic, or futile, in view of nations' increasing subjection to international law and international markets.

In response, I first describe the different ways in which a people may be said to be sovereign; discuss examples of constitutions that put these different ways into effect; criticise Australia's feebler manifestations of popular sovereignty; and suggest we emulate those systems where *real* sovereignty of the people is most developed. Finally, I address two globalisation-based objections to popular sovereignty, demonstrating that reports of its demise are greatly exaggerated.

The sovereignty of the people: fiction and various levels of reality

In a democracy, we hear frequent references to the 'sovereignty of the people'. However, this can have a variety of meanings in reality. Edmund

1 Primarily through submissions to public inquiries into constitutional reform. See Electoral and Administrative Review Commission (Queensland), *Review of the Preservation and Enhancement of Individuals' Rights and Freedoms, Public Submissions*, Vol 3, Submission 130; and my submission to the Queensland Constitutional Review Commission (at http://www.constitution.qld.gov.au/subs/sub_pyke.html). These focus on State constitutional issues, but my arguments readily apply to the Commonwealth Constitution.

2 Only recently, ironically, has Australia's independent sovereignty been recognised: *New South Wales v Commonwealth* (*Seas and Submerged Lands Case*) (1975) 135 CLR 337; *Sue v Hill* (1999) 73 ALJR 1016). Now it seems (if we believe the globalisation rhetoric) it might be nugatory anyway: *Sic transit imperium Australiae*!

Morgan persuasively suggests[3] that the concept was first used as a fiction, by people fighting for power against rivals who invoked another then-powerful fiction: the divine right of kings. Although (as Morgan agrees) the fiction was eventually given more and more reality, it has varying *degrees* of reality when English, Australian and American constitutional law are compared.

Merely political sovereignty

In the 19th century even Dicey, famous for insisting that in England the Parliament was legally sovereign,[4] accepted that the word also had a political sense[5] – and that this 'political sovereign', the authority whose will was *ultimately* obeyed, was the electorate.[6] Now that every adult citizen (with a few reasonable disqualifications) is represented, the fiction is even more credible: in a sense that we can all believe, 'the people' exercise their 'sovereignty' at every election.

But, where Diceyan theory remains unmodified, there is a basic problem with this notion. Under this model, the people's political sovereignty depends, in law, absolutely on the grace of the legally sovereign Parliament. Parliament enacted the laws that gave everyone the vote, and that limit its term – and as a matter of law Parliament could repeal them. A system which says Parliament is legally sovereign, but which relies on politicians' decency (or fear of the electorate) to ensure the people *remain* the political sovereign, is curious indeed. Anyone but the English would expect *at least* universal franchise and regular fair elections to be guaranteed in a document of higher legal status than ordinary legislation.

Legal sovereignty of a reactive kind

In Australia, of course, no parliament has an unfettered legal sovereignty. The powers of the Commonwealth and State parliaments are limited by the Commonwealth Constitution. In the free speech cases,[7] and again in *McGinty's Case*,[8] three Justices of the High Court have expressly recognised that the sovereign power over this Constitution is vested in the people. The rules protected by this sovereignty seem to satisfy the criteria above for

3 E Morgan (1988) *Inventing the People*, WW Norton.

4 AV Dicey (1885) *Introduction to the Study of the Law of the Constitution* (7th edn, 1915), p 39.

5 Compare Gummow J's reference in *McGinty v WA* (1996) 186 CLR 140 at 275 to a 'popular or political meaning' of sovereignty.

6 Dicey (1885); 7th edn, (1915), p 73.

7 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* ('ACTV') (1992) 177 CLR 106 per Mason CJ at 138 and Deane and Toohey JJ at 70.

8 *McGinty v WA* (1996) 186 CLR 140 per Toohey J at 199, McHugh J at 230 and Gummow J at 274–5.

constitutionally guaranteeing the people's *political* sovereignty. As to the Federal Parliament, the Constitution guarantees a term limit[9] and, although on its face it leaves electoral qualifications up to parliament,[10] the implications drawn from the words 'directly chosen by the people' in the free speech cases certainly guarantee the universal franchise as well as 'freedom of communication in relation to public affairs and political discussion'.[11] As the latter guarantee extends to laws affecting State political affairs,[12] it may be speculated that some guarantees as to State electoral processes may be implied as well – though no guarantee of equal electoral districts, at least for the moment.[13]

However, even as their Honours recognised the sovereignty of the people, one of them[14] noted accurately that they (we!) are 'sovereign' in a very qualified way, because we cannot initiate Constitutional amendments ourselves. The Parliament proposes and we the electors merely dispose. Indeed the reality is somewhat worse. Although s 128 *does* allow for a referendum if one House passes an Alteration Bill twice, only proposals favoured by the executive have any chance; it is generally agreed that because the Governor-General will follow Ministerial advice on whether to hold a referendum, an Alteration Bill sponsored by Opposition or Independent Senators will get nowhere. So in reality, the *executive* proposes and we the electors dispose.[15] If we are the sovereign, we are merely a *reactive* sovereign, not a 'proactive' one.

Problems with either of the above two models

The fact that our reactive legal sovereignty guarantees our political sovereignty is certainly a source of some comfort – at the end of a parliamentary term, we can throw the scoundrels out. But, especially given that in our Parliaments the executive generally has the loyalty of the majority of members, there is *no* guarantee even of rights closely connected with the preservation of our sovereignty. Consider three recent examples from Australian States:

- If the executive has first drafted a liberal *Freedom of Information Act* that it later finds irksome, it can push through Parliament an amendment

9 Section 28.

10 Sections 8 and 30.

11 The phrase is from *ACTV* per Mason CJ at 138.

12 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

13 *McGinty v WA* (1996) 186 CLR 140

14 Gummow J in *McGinty* at 275–6

15 And the situation is the same in those States where some provisions of the *Constitution Act* are 'entrenched' by 'manner and form' provisions. In each case only the parliament can initiate change, and except in times of minority government only proposals from the government benches will be passed by parliament.

that broadens the exemptions so that any papers taken to a Cabinet meeting, whether or not considered by the meeting or even relevant to it, are exempt. Then *both* major political parties can play the game of promising to repeal the amendments in opposition, and neglecting to do so in government.[16]

- If the Premier is about to be subpoenaed to give evidence of a meeting with leading businessmen, the executive can have Parliament amend the *Evidence Act* so as to reverse the decision in *Conway v Rimmer*[17] by restoring the conclusive status of a certificate by the Attorney-General claiming Crown privilege.[18]
- If the Auditor-General is embarrassing the executive (a sign that he is doing his job!), the executive can tell Parliament to 'privatise' some of the Auditor's functions,[19] and reduce his budget to inhibit his carrying out the remaining ones.

Instead of mere political sovereignty, exercised only on polling day, we need rules that limit the powers of Parliaments and executive governments throughout the other three (in many jurisdictions, four) years between elections, and we need to be able to initiate the entrenchment of such rules in constitutions ourselves.

Real ('proactive') legal sovereignty, and mechanisms for implementing it

We hear less about America's State Constitutions than about its federal document,[20] but the former offer interesting precedents for truly implementing of the sovereignty of the people. As Edmund Morgan has noted,[21] the fiction of popular sovereignty eventually gave birth, in the United States, to the notion that the many could construct safeguards against the few. It is pleasing to be able to note, in a book sponsored by the Fulbright Commission, that we find two safeguard mechanisms used widely in the United

16 *Freedom of Information Act* 1992 (Qld) s 36(1) as progressively amended in 1993 and 1995. See WB Lane, 'Reform of Administrative Law in Queensland' (1996) 79 *Canberra Bulletin of Public Administration* 174 at 180–1.

17 [1968] AC 910.

18 *Evidence (Amendment) Act* 1979 (NSW). The new sections were repealed, after a change of government, by the *Evidence (Crown Privilege) Amendment Act* 1988.

19 *Audit (Amendment) Act* 1997 (Vic). See W Funnell (1997) 'The Curse of Sisyphus: Public Sector Audit Independence in an Age of Economic Rationalism' 56 *AJPA* 87; M Rayner, (1997) 'Watchdog on a Leash', *Eureka Street*, December, 24–5; R Manne (1999) 'Victoria's State of Silence', *Sydney Morning Herald*, 13 September.

20 'Public law scholarship and professional literature are overwhelmingly occupied with the single national government'. HA Linde (1999) 'Structures and Terms of Consent: Delegation, Discretion, Separation of Powers, Representation, Participation, Accountability?' 20 *Cardozo Law Review* 823 at 824.

21 E Morgan (1988) *Inventing the People*, WW Norton, pp 282–5.

States at State level. One is Citizen-Initiated Referendum (CIR); the other, a requirement that an elected Constitutional Convention be held (or at least that a referendum decide if one shall be held) at regular intervals, or if a certain number of voters demand. If I count right, 14 State Constitutions allow constitutional amendment by CIR; another 14 require that if no Constitutional Convention has been held in the last nine, 10, 16, or 20 years, a referendum is to be held giving the electors the power to demand such a Convention; and 14 enable a Convention to be called via CIR.[22] Four States have two of these mechanisms, and one (Montana) has all three, so 24 States have at least one.[23] Australia has copied many important ideas from America's federal Constitution; as we emerge from the shadow of colonialism and the legacy of Professor Dicey, we could do worse than to copy from American State Constitutions also.[24]

If mechanisms like these were available, they could be used to introduce Bills of Rights (and other controls on legislative and executive power) into our State and federal constitutions – and make them rather more like American constitutions. Despite the fears of gloomy liberals,[25] I suspect a majority of Australians would support entrenchment of the traditional 'Bill of Rights rights', including guarantees of fair criminal process – but exactly what is enacted will be up to the majority to decide, and they may prefer more or fewer restrictions from time to time. If at any time the people feel confident that the Parliament or executive is unlikely to misuse its powers, they *might* even take restrictions away, but they would retain power to re-impose them. The actual list of rights and restrictions selected is less important than the overriding principle that the people have authority to specify the limits of legislative power and to vary these limits from time to time.

The United States experience also shows that entrenched, justiciable Constitutions are *not* used solely to mandate 'right-wing' classical liberal ideas of *laissez-faire* and limited government. They can, and do, also direct governments to take positive action for the collective good. In what is generally seen as the world's least 'Socialist' democracy, almost all State Constitutions command that there shall be State-funded education. Many require it to be 'uniform', 'thorough' or 'efficient'; hence in 1971 California's Supreme Court could rule that distributing funds among school districts

22 I propose to post a complete table of these details on my website at http://ozconstinfo.freehomepage.com/US_States.html.

23 I am not saying that the people of 26 US States are 'not sovereign'. Remember, I distinguish *forms* of sovereignty. The people of those States, like the people of the United States as a whole, indeed enjoy *political* sovereignty and *reactive legal* sovereignty – but they do not have *proactive legal* sovereignty, and in my opinion they are the poorer for that.

24 See P O'Brien and M Webb (eds) (1991) *The Executive State: WA Inc and the Constitution*, Constitutional Press, for similar proposals.

25 See particularly C Puplick (1996) 'Citizen-Initiated Referendums: The Case Against' in K Wiltshire (ed), *Direct Democracy: Citizens-Initiated Referendums*, Constitutional Centenary Foundation.

proportional to the property taxes raised in each (creating richer schools in affluent districts) was unconstitutional. Over the next 20 years, about half the States saw lawsuits challenging their school funding systems, about half of which succeeded.[26] This is the kind of policy that (assuming that a majority wanted) we voters could impose on our governments if Australians, too, enjoyed proactive popular sovereignty.

CIR is controversial in Australia; often advocated, but vigorously opposed. The literature on CIR[27] contains the standard arguments, which need not be repeated here, for and against a system that involves proactive popular sovereignty ('direct democracy'). Of course, to realise popular sovereignty it is not strictly necessary to allow the making of ordinary laws by CIR, as long as constitutional amendments can be initiated.[28] But if even that form of CIR is thought to give the uneducated People too much of a say, there is the other alternative – that if there has been no Constitutional Convention for some years, the people *must* be asked if they want one, and if so, they *must* be permitted to elect one directly. After all, Constitutional Conventions are an established Australian tradition,[29] although more in connection with the federal than the State constitutions. What I must answer here, however, is an objection not much addressed in the CIR debate cited above, and never, to my knowledge, raised in respect of Constitutional Conventions – that to put such sovereignty into effect (at State *or* national level) by either mechanism would conflict with, or be rendered futile by, the forces of globalisation.

Does proactive popular sovereignty clash with globalisation?

The sovereignty of nations (whoever exercises it *within* each nation) is now said to be under threat from two different, but overlapping, sources. Firstly,

26 See JD Leshy (1990) 'The State of Constitutional Law in the States of the United States: Are There Any Lessons for Australia?' 20 *UWA Law Review* 373.

27 The best recent arguments against CIR are found in DA Bell Jr (1978) 'The Referendum: Democracy's Barrier to Racial Equality' 54 *Washington Law Review* 1; G Brennan (1997) 'Direct Democracy: The Case Against' *Policy* (Autumn) 32–4; JN Eule (1990) 'Judicial Review of Direct Democracy' 90 *Yale Law Journal* 1503; NE Franklin (1992) 'Initiative and Referendum: Participatory Democracy or Rolling Back the State?' in M Munro-Clark (ed), *Citizen Participation in Government*, Hale & Iremonger; C Puplick (1996). Arguments in favour are presented in G Walker (1987) *Initiative and Referendum: The People's Law*, Centre for Independent Studies.

28 In practice, however, limiting CIR to 'constitutional' matters tends to invite the 'constitutionalisation' of policy matters otherwise left to ordinary statute – eg, the Swiss Constitution's Art 25 *bis* which bans slaughter of animals without first stunning them – so, in practice, popular sovereignty may require 'legislative' as well as 'constitutional' CIR.

29 Conventions whose proposals succeeded at referenda were held in 1891, 1897–8, and the mid-1970s. Although the 1999 republic model was rejected, many praised the participatory process of the 1999 Canberra 'ConCon'.

the growth of international customary law and treaties affects domestic legal systems more and more, precluding legislators and voters from selecting certain policies for fear of trans-national disruption. Secondly, the hard facts of competition in globalised markets make it futile for nations or States to attempt to regulate industries and workplaces. Does either of these forces limit what the people of a State or nation might want to enact in the exercise of their proactive sovereignty; and if so, which should prevail? My answer is that in some cases the conflict is illusory, and in other cases the people are perfectly entitled at least to *try* to make a free choice rather than passively wait for the globalisation juggernaut to roll over them.

Popular sovereignty and 'redneck' populism

Under the Westphalian tradition, nations were supposedly immune from external interference in their internal affairs, even if those involved discrimination against minorities or the general tyrannisation of the whole populace. Today – when most countries at least pay lip service to the *International Covenant on Civil and Political Rights* (ICCPR), and many have signed the protocol allowing citizens to seek declarations against their own nation – this extreme sovereignty is no doubt qualified. So if a people, exercising their proactive sovereignty, sought to enact a Constitution amendment discriminating against a minority, there would indeed be conflict between international norms and this particular attempt to assert their sovereignty.

However, there would be no such conflict between international norms and the *principles that justify* the sovereignty of the people. I am assuming that, under either of the mechanisms advocated, a majority vote is sufficient to enact new constitutional provisions. But 'majority rule' is not *in itself* an axiom of democracy.[30] The reason *why* we follow majority decisions in a democracy is more fundamental: because everyone counts, and equally.[31] To say that democracy requires not only majority rule but also respect for minorities is not contradictory; instead, *both* principles are derived from the same idea.[32] In a democracy, any move to strip one group of its fundamental right of political participation can be opposed with the argument 'If them today, why not you tomorrow?' If that democracy is truly healthy, that argument will sway most people's votes – and if the majority still makes a decision that violates some international norm, then international law is only reminding the majority of a principle it forgets at its peril.

30 I know of no attempts to justify majority rule as an end in itself, except for an offhanded analogy with the vector addition of forces in Locke's *Second Treatise*.

31 Thus a commitment to 'equal concern and respect' entails equal votes for all: RM Dworkin (1977) *Taking Rights Seriously*, Harvard University Press, p 273.

32 See LG Sager (1981) 'Rights Scepticism and Process-Based Responses' 56 *New York University Law Review* 417 at 445.

Moreover, recourse to international law helps overcome the fears of the 'gloomy liberals' mentioned above. James Madison first realised, and many elections have confirmed, that irrational 'populist' candidates or proposals are less likely to reach majority support in a large than a small population.[33] So federations can have two possible safeguards against the people of a small community exercising what they might think of as their local sovereignty to, say, forbid sale of land to people of Asian birth or descent. By voluntarily joining a federation, each State and its people agree to submit their local sovereignty to the overall sovereignty of the federated people. If, as in America, the federal Constitution contains a Bill of Rights, it will override anything inconsistent in the State's laws – or even its Constitution.[34] Alternatively, as in Australia, the power over external affairs in a federation will almost certainly belong to the national government: therefore a federal law implementing the *ICCPR* and other treaties will also override the offensive provision. If the federal Constitution provides mechanisms for proactive sovereignty, supporters of the offensive policy can try to 'constitutionalise' it at the national level, but they would have the large population principle working against them.

A more specific fear in the area of discrimination is that the people may use proactive sovereignty mechanisms to discriminate against recent immigrants; Switzerland is currently debating a proposal to limit the number of non-Swiss residents,[35] and California adopted a proposition[36] banning non-naturalised migrants from welfare entitlements. Though these worry me, as showing a disregard for the notions of the 'siblinghood' and interrelatedness of all humanity, it has to be said that whilst no people, under principles of international law or general decency, has a right to be actually brutal to guests, each people does have a right to regulate entry into itself. The fact that such measures may be proposed is not a strong reason for a liberal democrat to oppose CIR or other proactive sovereignty measures; if the anti-migrant measures are proposed, she or he will still be free to campaign against their adoption. Once a migrant has been naturalised, or once children have been born in the new country, of course things are different – someone who is a member of a nation is entitled not to be discriminated against, under both the rules of international law and the principles underlying popular sovereignty.

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33 '[A]s each representative will be chosen by a greater number of citizens . . . it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried': J Madison, A Hamilton and J Jay (1987) *The Federalist Papers*, Penguin Books, No 10. It is tempting to contrast the success of Pauline Hanson's One Nation Party in Queensland's 1998 State election (11 of 89 seats) with its failure to win any seats in the federal poll later that year.

34 Even if the State provision is enacted via referendum. Cf *Lucas v Colorado* 377 US 713 (1964); *Reitman v Mulkey* 387 US 369 (1967); *James v Valtierra* 402 US 137 (1971).

35 'Swiss Beauty Proud of her Maori Roots' (2000) *Courier-Mail*, 19 September, p 11.

36 Proposition, 187, approved by referendum on 8 November 1994.

Popular sovereignty and international market forces

The other main objection to stronger implementation of popular sovereignty is that a populace, not comprehending the full import of economic and political factors, might attempt in vain to prevent or reverse some inevitable or necessary change. Now of course a people can no more legislate for the *factually* impossible than King Canute could stop the incoming tide, or the apocryphal American legislature could legislate that *pi* should equal three. But globalisation – as even *The Economist* admitted after the 1999 anti-WTO protests – is not such a foregone conclusion.[37] Unless and until it cedes its autonomy to a larger union, a society is entitled to *try* to insulate itself from external market or political influences *if* its voters see any benefit in trying. So if Switzerland refuses to join the European Union, or even the United Nations, that is its right.[38] So Denmark votes against the Maastricht Treaty at its first referendum? Those in favour campaign harder, and the second time the majority votes 'yes'. After all, joining a federation, or a quasi-federation like the European currency union, is probably irrevocable;[39] a society is entitled to think carefully before signing up. The argument 'You are only delaying the inevitable' may turn out to have been true; but even so, your state can still join the union later, like Denmark (or South Carolina and Rhode Island in 1779, or Newfoundland in 1948). A people has a perfect right to resist even the 'inevitable' while it can.

If the pressures are market forces rather than moves towards political union, the argument becomes more complex. Resistance to globalisation usually takes the form of calls to restore quotas or tariff protections, but the problem is that protecting one domestic industry may disadvantage another. If they had the legislative power, the people of Orange, NSW (where Email Ltd's main factory is located) may well decide to protect whitegoods against import competition, and the people of Kingaroy might vote to protect peanuts, to the disadvantage of importers and consumers. But no jurisdiction so small ever has power to make laws about overseas trade. The point above concerning federations applies here also: the people of each State have transferred their power over those matters to the people at the federal level. Even if CIR were available at the federal level, the national populace has such a variety of economic interests that a voter- (or Convention-)initiated referendum proposing higher or lower tariffs would likely be rejected on the prudent ground that such fine-tuning is best left to our parliamentarians –

37 J Smith and TP Moran (2000) 'WTO 101: Myths about the World Trade Organisation' 47 *Dissent* (Spring) 70.

38 Although some criticise this decision (KW Kobach (1993) *The Referendum: Direct Democracy in Switzerland*, Dartmouth, pp 201–2), it is hard to call Switzerland a worse 'international citizen' than many UN members (even some permanent sinecurists on its Security Council)!

39 As the US South found in 1861–5, although contrast the (relatively) peaceful secessions of Singapore in 1965 and Slovakia in 1992.

just as, at the 1891 Convention, the delegates from the high- and low-tariff Colonies avoided the 'lion in the path' by agreeing to leave tariff levels to the majority in the new Parliament. And even if the sovereign people did enact something that turned out unworkable, they would retain the right and power to revoke the decision later.[40]

Conclusion

The idea of the 'sovereignty of the people' emerged in 17th century English revolutionary tracts, but was first given real effect in 18th century America. The idea that globalisation is inevitable is more 'modern' – but that does not mean that, in succumbing to this greater modernity, we Australians cannot also do some belated catching-up on an older wave of modernity. As we take our place in this brave new globalised world, we should do so as a nation which recognises that – insofar as *any* nation preserves the old concept of sovereignty – that sovereignty should be exercised directly by its people.

40 For examples see KN Vines and H Jacob (eds) (1976) *Politics in the American States: A Comparative Analysis*, Little, Brown.